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IN THE

Supreme Court of the United States

GDF REALTY INVESTMENTS, LTD.; PARKE PROPERTIES I, L.P.; AND PARKE PROPERTIES II, L.P.,
Petitioners,

v.

GALE A. NORTON, SECRETARY OF THE INTERIOR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE STATES OF TEXAS, ALASKA, DELAWARE, AND NORTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does Congress's authority "[t]o regulate Commerce . . . among the several states," U.S. CONST. art. I, § 8, cl. 3, permit the application of the Endangered Species Act to purely local activities that might potentially harm the habitat of wholly intrastate and commercially irrelevant species of cave-dwelling arthropods?

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INTEREST OF *AMICI CURIAE*

The States have a significant interest in maintaining their sovereign control over wildlife regulation, land-use planning, and other matters of traditional state concern within their borders. Although the States recognize Congress's authority to regulate interstate commerce, the States' authority does not give way when the subject of Congress's regulation has no real connection to interstate commerce. The aggregation rationale applied by the Fifth Circuit permits Congress to regulate matters of purely state concern without any real connection to interstate commerce, in conflict with *United States* v. *Lopez*, 514 U.S. 549 (1995), *United States* v. *Morri-*

son, 529 U.S. 598 (2000), *United States* v. *Wang*, 222 F.3d 234 (CA6 2000), and *Gibbs* v. *Babbitt*, 214 F.3d 483, 497 (CA4 2000).

The States have demonstrated that they are able and willing to protect endangered species within their borders, and the vast majority of States have enacted regulatory schemes for ensuring that protection. The amici States are filing this brief to assert their interest in restoring state control over their land-use decisions and returning to the federal-state balance of power secured by the Constitution.

REASONS FOR GRANTING THE PETITION

There is no justification for the aggregation principle applied by the Fifth Circuit. Congress cannot generalize and aggregate the economic effects of: (1) carrying guns to regulate the carrying of guns in a school zone, (2) violence against women across the country to regulate local crimes against women, (3) robbery, arson, or murder to reach purely noncommercial incidents of those crimes, or (4) interstate movement of migratory birds to regulate purely intrastate locations visited by those birds. Nor may Congress regulate the taking of purely intrastate species that have no connection to interstate commerce and no connection to species that do. The Fifth Circuit's holding to the contrary conflicts with the interpretation of the Court's Commerce Clause precedent by other courts of appeals and leaves the States with grave uncertainty regarding the degree to which the commerce power extends Congress's reach to police land-use decisions and other traditional areas of state concern.

"[T]he Framers crafted the federal system of government so that the people's rights would be secured by the division of power." *Morrison*, 529 U.S. at 616 n.7. Under the Commerce Clause, "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560. However, "[t]he

Constitution requires a distinction between what is truly national and what is truly local." *Morrison*, 529 U.S., at 617-18. The Fifth Circuit's understanding of when an activity "substantially affects interstate commerce" obliterates that distinction, infringing on the States' authority to regulate what is truly local.

I. THE DEEPENING CONFLICT AMONG THE COURTS OF APPEALS LEAVES THE STATES WITHOUT CERTAINTY REGARDING THE LIMITS OF CONGRESS'S POWER TO REGULATE MATTERS OF LOCAL CONCERN.

Because the States require certainty regarding what intrastate activities Congress may and may not regulate, the Court should grant the petition and reject the limitless theory adopted by the Fifth Circuit. When Congress uses the Commerce Clause to intrude into areas of traditional state authority, the Court applies heightened scrutiny, recognizing its "particular duty to ensure that the federal-state balance is not destroyed." *Lopez*, 514 U.S., at 580-81 (Kennedy, J., concurring) (citations omitted). In *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001), the Court observed that its concern with a regulation that pushes the limits of congressional authority "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id.*, at 173. When a statute "upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power," judicial intervention is required. *Lopez*, 514 U.S., at 580 (Kennedy, J., concurring). "Congress may regulate intrastate activity that has a 'substantial effect' on interstate commerce." *Id.*, at 557 (quoting *United States v. Darby*, 312 U.S. 100, 119-20 (1941)). However, since *Morrison*, the courts of appeals have adopted divergent standards for applying the "substantial effect" test that would lead to contradictory results on similar facts. In

other words, a given application of a federal statute might be a constitutionally valid exercise of the commerce power in one circuit but constitutionally invalid in another.

The Sixth Circuit, for example, in determining the scope of the commerce power, rejects reference to long chains of causal effects of the type necessary to support the Fifth Circuit's application of the aggregation principle under its theory that the conjectured "interdependent web" among all species, *GDF Realty Invs., Ltd.* v. *Norton*, 326 F.3d 622, 640 (CA5 2003), permitted Cave Species takes to be aggregated with takes of all other endangered species, including species relevant to commerce, to find a substantial effect on interstate commerce. *United States* v. *Wang*, 222 F.3d 234 (CA6 2000), rejected application of the Hobbs Act, 18 U.S.C. §1951, to convict Wang for robbing a private residence although the robbery included $1,200 belonging to a restaurant doing business in interstate commerce. *Wang*, 222 F.3d, at 240. The court explained that finding a substantial effect on interstate commerce in that case would require acceptance of what it termed the "butterfly effect" or, alternatively, "the 'dog, dog bite pig' theory of causation," which the court declined to do, finding it inconsistent with *Lopez* and *Morrison*. *Id.*, at 239 & n.1. The Fifth Circuit's acceptance of the analogous "cave bug effect" as a basis for exercising the commerce power in this case is in direct conflict with *Wang*'s application of *Lopez* and *Morrison*.

Applying the same ESA provision at issue in this case, the Fourth Circuit held that the provision could be constitutionally applied to regulate takes of a particular species—the red wolf—that the court specifically found had an effect on commercial activities. *Gibbs*, 214 F.3d, at 497 ("The protection of the red wolf on both federal and private land substantially affects interstate commerce through tourism, trade, scientific research, and other potential economic activities."). If the Fourth Circuit accepted the Fifth Circuit's

"interdependent web" theory, its finding that the red wolf itself has an effect on commerce would be superfluous. Presumably free-ranging, carnivorous wolves are at least as "interdependent" with other species as are minute arthropods that spend their entire lives in an intrastate cave. By recognizing that the commercial relevance of the particular species in question is pertinent to whether a particular application of the ESA take provision is constitutionally valid, the Fourth Circuit applies a limitation that conflicts with the boundless rule adopted by the Fifth Circuit, which permits not only federal regulation of takes of any species but also federal regulation of countless other activities that themselves have no economic effect.

The D.C. Circuit has managed to directly conflict with the Fifth Circuit while, at the same time, adopting a similarly expansive view of the commerce power that also permits application of the ESA take provision to regulate takes of any species, regardless of the particular species' connection to commerce (or utter lack thereof). *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (CADC 2003), held that the ESA take provision was validly applied to prohibit development in a portion of California inhabited by the arroyo toad—which, like the Cave Species, is a wholly intrastate beast with no known value in commerce—because the back-end effect of applying the take provision, *i.e.*, the thwarting of a planned housing development, was economic in nature. *Id.*, at 1072-73. Observing that "[t]he ESA does not purport to tell toads what they may or may not do," the court held that the federal government may tell Rancho Viejo what it may or may not do with respect to noncommercial, intrastate toads because Rancho Viejo and its conduct "have a plainly commercial character." *Id.*, at 1072.

The D.C. Circuit thus accepted the theory for upholding applications of the take provision that the Fifth Circuit flatly rejected in this case. *See GDF*, 326 F.3d, at 627, 636

(holding that the district court erred in relying on the fact that it was "hard-pressed to find a more direct link to interstate commerce than a Wal-Mart" to uphold the application of the take provision). However, under the D.C. Circuit's theory, which focuses on the character and intent of the actor being regulated rather than the species that is the subject of the regulation, Congress can forbid any commercial actor from taking a Cave Species, regardless of species "interdependence," but perhaps could not forbid a noncommercial actor from doing so. *See Rancho Viejo, LLC*, 323 F.3d, at 1080 (Ginsburg, C.J., concurring) (opining that the commercial character *vel non* of the actor provides "a logical stopping point" to the court's rationale, but acknowledging that "it goes unremarked in the opinion of the court"). By extension of the D.C. Circuit's rationale, Congress could, perhaps, prohibit the owner of a gun store from transporting guns through a school zone, even if regulation of the same activity by another individual is purely a matter of state concern.

Those conflicts leave the States in doubt regarding the extent to which Congress's commerce power permits it to intervene in matters of traditional state concern. An application of the ESA's take provision to a given species could be unquestionably valid, valid only if the particular species has commercial relevance, or valid only if the actor being regulated is commercial in character depending on which court of appeals is deciding the validity of the federal regulation. Moreover, the Fifth Circuit's rationale permitting aggregation of noneconomic activity with economic activity to find a substantial effect on interstate commerce has broad ramifications that would bring virtually any conceivable intrastate activity within reach of the commerce power. And the D.C. Circuit's approach would permit unbridled federal regulation of at least any activity conducted by intrastate commercial actors. The Court's guidance is badly needed to

resolve those conflicts and provide the States with the certainty they need for the prudent exercise of the police powers reserved to them by the Constitution.

II. THE FIFTH CIRCUIT'S HOLDING DEMONSTRATES THE NEED FOR THE COURT TO CONSTRAIN CONGRESSIONAL REGULATION OF NONECONOMIC INTRASTATE ACTIVITY.

A. In Conflict With *Lopez* And *Morrison*, The Fifth Circuit's New Commerce Clause Jurisprudence Permits Congressional Interference With Matters Of Purely Intrastate Concern That Have No Relation To Interstate Commerce.

The Fifth Circuit's aggregation of Cave Species takes, which have no effect on interstate commerce, with takes of all endangered species nationwide establishes a limitless principle under which no intrastate activity would be beyond the reach of Congress's Commerce Clause power. That result cannot be squared with the Court's admonitions that the commerce power establishes a constitutional balance that respects the States' interests in regulating traditionally local concerns. In resolving the conflict among the circuits, the Court should reject the Fifth Circuit's limitless conception of the commerce power.

The court of appeals correctly found that the "tiny bugs, which dwell solely in the caves and never emerge on the surface of the land," *GDF Realty Invs., Ltd.* v. *Norton*, 362 F.3d 286, 287 (CA5 2004) (Jones, J., dissenting from denial of rehearing en banc), themselves have no substantial effect on interstate commerce. *GDF*, 326 F.3d, at 637-38. Indeed, the Cave Species have no effect on "commerce" of any kind. The regulation of Cave Species takes is therefore a purely

intrastate, noncommercial phenomenon. There is no linkage from the Cave Species to any commercial activity through which their existence could affect interstate commerce.

If, as the Fifth Circuit held, the aggregation principle can properly be applied to permit aggregation of an isolated, purely intrastate, noncommercial activity with activity that does affect interstate commerce based solely on a superficial similarity, there will be no intrastate activity that the commerce power cannot reach. For example, carrying a gun in a school zone is, in many ways, like carrying a gun aboard a commercial airliner. The latter activity may well have an economic effect on interstate commerce. The former does not, and *Lopez* establishes that Congress cannot merely generalize by aggregation to regulate the carrying of guns. *Lopez*, 514 U.S., at 567 (declining to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

It simply cannot be consistent with the Court's view of the commerce power, as articulated in *Lopez* and *Morrison*, to aggregate Cave Species takes with takes of all other endangered species in a way that circumvents the limitations on Congress's power to interfere with traditional state concerns. *Lopez*, discussing limitations described in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), emphasized that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local.'" *Lopez*, 514 U.S., at 557. *Morrison* reaffirmed that emphasis on the constitutional balance between state and national spheres of interest. *Morrison*, 529 U.S., at 617-18.

As the uncontroverted record evidence demonstrates, there is no connection—not even an indirect and remote one—between Cave Species takes and takes of species that might have some effect on interstate commerce. By comparison, the aggregation principle as applied in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), "which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S., at 560, involved a clear linkage from the regulated activity—the growing of wheat—and the effect on commerce through the activity's effect on supply and demand in the wheat market. *Wickard*, 317 U.S., at 127-28. Although the individual farmer's effect was trivial, multiplication produces a substantial direct effect on commerce.

In contrast to *Wickard*, the chain of effects from a Cave Species take stops at the mouth of the cave. The Fifth Circuit's "interdependence of species" rationale—as applied to the Cave Species—is, at best, the type of unsupportable conjecture that the court rightly rejected when considering FWS's claim that takes of Cave Species, standing alone, had a direct relationship with interstate commerce. Moreover, the only evidence in the record tends to disprove that conjecture: the Cave Species are not interdependent with anything outside their caves.

As the Court has recognized, land use is traditionally an area of state concern. *See, e.g.*, *Solid Waste Agency*, 531 U.S., at 174; *Lake Country Estates, Inc.* v. *Tahoe Reg'l Planning Agency*, 440 U.S. 391, 402 (1979). The conservation and protection of wildlife is also uniquely within the States' police power, and the States enjoy great latitude in determining the means for that protection. *See Lacoste* v. *Dep't of Conservation*, 263 U.S. 545, 552 (1924); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1064 (CADC 1997) (Sentelle, J., dissenting); *accord Hughes* v. *Oklahoma*, 441 U.S. 322, 337 (1979) (recognizing that wildlife protec-

tion is a legitimate local purpose, similar to the States' interest in protecting the health and safety of their citizens). All powers not delegated to the federal government are reserved to the States or the people. U.S. CONST. amend. X; *Alden v. Maine*, 527 U.S. 706, 713-14 (1999). FWS's application of the ESA take provision to forbid development of Texas land because it is the habitat for the noncommercial, intrastate Cave Species infringes on the States' ability to regulate land use and wildlife within their borders.

The ESA as applied to purely intrastate species improperly treads on the States' sovereign interest in regulating land use and finding their own balance in permitting commercial development while preserving endangered intrastate species. By its terms, the ESA's take provision prohibits the taking of any endangered species, regardless of its connection to interstate commerce. 16 U.S.C. §§1538(a)(1), 1532(19). The federal regulations define "take" expansively to include any habitat modification or degradation that kills or injures wildlife, potentially including the proposed land development in this case. 50 C.F.R. §17.3.

The take provision, at least as applied to intrastate species, is not a valid exercise of Congress's power under the Commerce Clause. By regulating purely intrastate species without any link to commerce, the ESA ignores that the federal government is one of limited, enumerated powers. *See* U.S. CONST. art. I, §8; *Lopez*, 514 U.S., at 552; *New York* v. *United States*, 505 U.S. 144, 155 (1992). The powers delegated to the federal government are few and defined, while those that remain in the state governments are numerous and indefinite. *Lopez*, 514 U.S., at 552 (citing THE FEDERALIST NO. 45, pp. 292-93 (Clinton Rossiter ed. 1961)); *Morrison*, 529 U.S., at 618 & n.8. The ESA's take provision—as applied in the manner upheld by the Fifth Circuit—turns this balance on its head by granting the federal government essentially a broad police power over endangered

species, regardless of their connection to interstate commerce. That application goes beyond the scope of Congress's authority under the Commerce Clause.

The division of authority in our federal system is not merely an empty distinction of a bygone era. *See Lopez*, 514 U.S., at 552 (citing *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991)). Rather, it continues to have force as a means of "secur[ing] to citizens the liberties that derive from the diffusion of sovereign power." *New York*, 505 U.S., at 181 (quoting *Coleman* v. *Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). As the Court recognized in *Lopez*, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Lopez*, 514 U.S., at 552 (quoting *Gregory*, 501 U.S., at 458). To restore this federal balance, the Court should declare the take provision unconstitutional as applied to purely intrastate species.

B. The Fifth Circuit's Holding Demonstrates That the Court Needs to Delineate the "Substantial Effect" Analysis.

Lopez and *Morrison* both suggested that, if a particular instance of an activity cannot be shown to have a *substantial* effect on interstate commerce, that instance must at least be economic in nature and have *some* effect to be the proper subject of aggregation. *See Lopez*, 514 U.S., at 560 ("Even *Wickard* . . . involved economic activity in a way that the possession of a gun in a school zone does not."); *Morrison*, 529 U.S., at 610 ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case."). However, *Morrison* declined to "adopt a categorical rule against aggregating the effects of noneconomic activity in order to decide these cases." *Morrison*, 529 U.S., at 613. The court of appeals relied in part on that language in *Morrison* to conclude that

the noneconomic takes of Cave Species could be aggregated with takes of all species to satisfy the "substantial effect" test. *See GDF*, 326 F.3d, at 630. The limitless result of applying the aggregation principle as the Fifth Circuit did demonstrates that it is time for the Court to adopt the categorical rule that the activity being regulated must itself be economic in nature before it can be aggregated with all other occurrences of similar activity in order to find a substantial effect on interstate commerce.

Lopez's review of Commerce Clause cases demonstrates that when the Court has sustained federal regulation of intrastate activity based on the activity's substantial effect on interstate commerce, the activity in question has been some sort of economic endeavor. *Morrison*, 529 U.S., at 611; *Lopez*, 514 U.S., at 559-60. Prior to its holding in this case, the Fifth Circuit recognized that, in determining whether an activity substantially affects interstate commerce, the first question a court should ask is "whether the regulated activity is an activity economic in nature." *Groome Res., Ltd.* v. *Parish of Jefferson*, 234 F.3d 192, 205 (CA5 2000) (citing *Morrison*, 529 U.S., at 611). But the Cave Species, which the Fifth Circuit has now held are within the sphere of federal regulation, are unquestionably not commercial in character. Nor are the alleged takes of the species in any way commercial. Like the possession of guns in *Lopez*, takes of species are not linked to commerce under the ESA and no jurisdictional element in the statute requires it. *See Lopez*, 514 U.S,. at 561-62. The ESA's regulation of intrastate species that have no connection to commerce cannot be justified by the Commerce Clause if that provision is to have any meaning as a limit on federal power.

By the Court's method of statutory interpretation in *Solid Waste Agency* and *Jones* v. *United States*, 529 U.S. 848 (2000), it further confirmed that the commercial nature *vel non* of the regulated activity is critical to the Commerce

Clause analysis. *Jones* refused to construe the federal arson statute to encompass arson of noncommercial buildings in part because that construction would raise "grave and doubtful constitutional questions" in light of *Lopez*. *Jones*, 529 U.S., at 857-58. *Solid Waste Agency*, on a similar rational, declined to construe the "Migratory Bird Rule" as permitting federal regulation of an intrastate sand and gravel pit when that regulation "would result in a significant impingement of the States' traditional and primary power over land and water use." *Solid Waste Agency*, 531 U.S., at 173-74. If the regulated activities at issue in *Jones* and *Solid Waste Agency*—which themselves had no effect on interstate commerce—could have been aggregated with the numerous similar activities that do affect interstate commerce, there would have been no constitutional question to avoid and the Court's avoidance rationale would have been meaningless.

By upholding the ESA's take provision as applied to purely intrastate, noncommercial species, the Fifth Circuit has squarely raised a grave constitutional question similar to those avoided in *Jones* and *Solid Waste Agency*. Because the court of appeals's "constitutionally limitless theory," *GDF*, 362 F.3d, at 287 (Jones, J., dissenting), would bring virtually any activity within the ambit of federal-government control, the Court should explain unequivocally that the aggregation principle is properly applied only to aggregate instances of activities that are themselves economic in nature.

III. THE STATES ARE ABLE AND WILLING TO PROTECT THEIR INTRASTATE NATURAL RESOURCES.

The Court's recognition that the Constitution reserves the general police power to the States has not left armed criminals free to roam the Nation's school zones or American women without redress for violence. *See Lopez*, 514 U.S., at 581-82 (Kennedy, J., concurring) (collecting data on state and

local efforts to keep guns out of schools); Julie Goldscheid & Risa E. Kaufman, *Seeking Redress for Gender-Based Bias Crimes—Charting New Ground in Familiar Legal Territory*, 6 MICH. J. RACE & L. 265, 269-71 (2001) (noting that several states already had laws that "provide redress for gender-motivated violence" and that "[i]n the wake of the *Morrison* ruling, several state legislatures have considered state civil rights provisions with language tracking that of the VAWA Civil Rights Remedy"). The States have the authority, duty, and ability to police matters of intrastate concern.

Accordingly, nearly all the States have enacted regulations designed to preserve endangered wildlife within their borders. *See* ALASKA STAT. §§16.20.180-.210; CAL. FISH & GAME CODE §§2050-2115.5; COLO. REV. STAT. §§33-2-101-108; CONN. GEN. STAT. §§26-303-316; DEL. CODE tit. 7 §§601-605; FLA. STAT. §§372.072-.074; GA. CODE §§12-6-171-176, 27-3-130-133; HAW. REV. STAT. §§195D-2-31; ILL. COMP. STAT. 10/1-10/11; IND. CODE §§14-22-34-1-21; IOWA CODE §§481B.1-.9; KAN. STAT. §§32-957-963, 32-1009-1012, 32-1033; KY. REV. STAT. §§146.600-.619, 150.183, 150.990; LA. REV. STAT. §§56:1901-:1907; ME. REV. STAT. tit. 12, §§7751-7759; MD. CODE, NAT. RES. I §§4-2A-01-09, 10-2A-01-09; MASS. GEN. LAWS ch. 131A, §§1-6; MICH. COMP. LAWS §§324.36501-.36507; MINN. STAT. §§84.0894-.0895; MINN. R. 6134.0100-0400; MISS. CODE §§49-5-101-119; MONT. CODE §§87-5-101-131; NEB. REV. STAT. §§37-801-811; NEV. REV. STAT. §§244-386-.388, 503.584-.660; N.H. REV. STAT. §§212-A:1-A:15; N.J. Stat. §§23:2A-1-14; N.M. STAT. §§17-2-37-46; N.Y. ENVTL. CONSERV. LAW §11-0535; N.C. GEN. STAT. §§113-331-337, 106-202.12; OHIO REV. CODE §§1531.24-.26, .99; OR. ADMIN. R. 635-100-0105; OR. REV. STAT. §§496.004, .171, .172-.192, 498.026, 527.610-527.885, 527.992, 564.100-.135; 30 PA. CONS. STAT. §2305; 34 PA. CONS. STAT. §2167; 17 PA. CODE §§45.31-.35; R.I. GEN. LAWS §§20-37-1-5; S.C. CODE §§50-15-10-90; S.D. CODIFIED LAWS 34A-8-1-13; TENN. CODE §§70-8-101-112; TEX. PARKS

& WILD. CODE §§49.015, 68.001-.021; 30 TEX. ADMIN. CODE §330.129; 31 TEX. ADMIN. CODE §§65.171, 69.1; UTAH CODE §§23-13-1-17; VT. STAT. tit. 10, §§5401-5410; VA. CODE §§29.1-563-570; WASH. REV. CODE §§77.12.020, 77.08.010, 77.15.005, 79.17.040; WIS. STAT. §29.604; *see also* MO. REV. STAT. §252.240; OKLA. STAT. tit. 29, §§5-412, 412.1, 7-206, 7-502-504, 7-601-602. Several States, including Texas, go even further, protecting "threatened" species as well. *See, e.g.*, 31 TEX. ADMIN. CODE §§65.171-.184, 69.1-.9; MASS. GEN. LAWS ch. 131A, §§1-6.

Clearly, invalidation of the Fifth Circuit's limitless application of the substantial effect test will not leave hapless intrastate fauna without protection. By displacing the state policy choices expressed by state laws protecting endangered species, however, the ESA renders the States' statutes and regulations largely irrelevant and discourages the further development of state regulatory schemes. The States should be allowed, and encouraged, to continue "perform[ing] their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S., at 581 (Kennedy, J., concurring). Federal control of state resources conflicts with the proper regard for the independence of state governments in carrying out their domestic policy. Rejection of the Fifth Circuit's boundless expansion of the commerce power would ensure that both intrastate natural resources and the now-endangered balance between federal and state sovereignty are preserved.

CONCLUSION

The Court should grant the petition for writ of certiorari, clarify the application of the substantial effect test, and reverse the court of appeals's judgment.

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